No. 78-1789

In the Supreme Court of the United States

OCTOBER TERM, 1980

ARKANSAS LOUISIANA GAS CO., PETITIONER

v.

FRANK J. HALL, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION AS AMICI CURIAE

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QUESTION PRESENTED

The United States and the Federal Energy Regulatory Commission will discuss the following question:

Whether, in an action for breach of a gas purchase contract subject to the Natural Gas Act, the Supreme Court of Louisiana violated the "filed rate" doctrine in holding that respondents are entitled to damages in excess of rates on file with the Commission.

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INTEREST OF THE UNITED STATES AND THE FEDERAL ENERGY REGULATORY COMMISSION

In Sections 4 and 5 of the Natural Gas Act, 15 U.S.C. 717c and 717d, Congress granted the Federal Energy Regulatory Commission [1] sole authority to determine the "reasonableness" of rates charged by natural gas companies for sales or transportation of natural gas subject to the Commission's jurisdiction. Under Section 4 of the Act, such rates must be filed with the Commission. After filing, the rates are subject to review by the Commission, which may order a

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[1] Under 42 U.S.C. (Supp. II) 7172(a)(1)(C), (D), (E), and (F), this agency has succeeded to the relevant functions and responsibilities of the former Federal Power Commission with respect to the certification and regulation of sales of natural gas in interstate commerce under the Natural Gas Act, 15 U.S.C. 717-717w. The term "Commission" herein refers to the Federal Power Commission or the Federal Energy Regulatory Commission as the context indicates.

refund of any portion of the new rates that is found to be excessive. Under Section 5 of the Act, however, the Commission is specifically prohibited from granting reparations for existing rates that are determined to be "unreasonable." The Supreme Court of Louisiana has drastically departed from this statutory scheme by holding that a party to a contract involving sales of natural gas subject to the Commission's jurisdiction under the Act may be awarded damages reflecting higher rates it was entitled to receive for past sales under the contract even though that party did not file new rate schedules with the Commission as required by the Act. Both the Commission and the United States have an interest in assuring that the purposes of the Act are not thwarted.

On October 1, 1979, the Court invited our views on the then pending petition for certiorari in this case. In our responses, we urged that the Court grant the petition and reverse the judgment of the Supreme Court of Louisiana. In this brief we amplify our reasons for urging reversal of the judgment below.

STATEMENT

In 1952 respondents, producers of natural gas, entered into a contract to sell gas to petitioner Arkansas Louisiana Gas Company ("Arkla"). The contract set forth a schedule of fixed prices, including increases in specific amounts to be effective every five years up to an agreed maximum. The contract also contained a further price escalation provision, known as a "favored nations clause," under which respondents were entitled to additional price increases if Arkla purchased gas at higher rates from any other "party seller" in the Sligo field of Northern Louisiana. After 1954, respondents obtained a certificate from the Commission to sell the gas under

the contract, and filed the contract and each of the scheduled increases in the fixed price with the Commission.

In 1974 respondents sued Arkla in Louisiana state court for breach of contract.[2] They claimed that Arkla had obtained certain leases in the Sligo field from the United States in 1961 and that Arkla's payments to the United States for gas and liquids produced from the leasehold had triggered respondents' right to higher prices under the favored nations clause.

Arkla denied the claims. It also moved the state court to dismiss the action on primary jurisdiction grounds and petitioned the Commission for a declaration that its lease payments had not triggered the favored nations clause. After several decisions and a remand from the United States Court of Appeals for the District of Columbia Circuit, the Commission denied Arkla's petition on May 18, 1979 (see Amici Br. App. 1a-15a).[3] The Commission held that under the circumstances of this case, it would decline to exercise primary jurisdiction in respect to what it viewed as essentially a dispute over contract issues that do not require the Commission's expertise or implicate policies under the Natural Gas Act (*id.* at 7a-13a). It concluded that those were matters that could and should be resolved by the state courts; it also expressed the view, however, that it would be contrary to the Natural Gas Act and the filed rate doctrine for the state courts to award respondents

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[2] *Hall* v. *Arkansas-Louisiana Gas Company*, 1st Judicial District Court, Caddo Parish, Louisiana, No. 225,699 (July 30, 1975).

[3] "Amici Br." refers to our initial response to the petition for certiorari in this case; "Amici Supp. Mem." refers to our supplemental memorandum at the petition stage.

damages for the period prior to 1972, when respondents acquired "small producer" status and were thus relieved of an obligation to file their rates with the Commission (*id.* at 12a n.18).[4] In other words, the Commission concluded that, prior to 1972, the amounts to which respondents were lawfully entitled were limited to the specific rates on file with the Commission and thus they could not be awarded an additional amount for that period based on an alleged breach of contract.

In the meantime, the state courts adjudicated respondents' contract action. The state trial court held that Arkla's payments to the United States after 1961 had triggered the favored nations clause; but it also held that under the filed rate doctrine respondents could obtain damages only for the period after 1972. The Louisiana Court of Appeal, Second Circuit, affirmed both aspects of the trial court's holding (78-986 Pet. App. 2a-20a; 359 So.2d 255 (1978)). The Supreme Court of Louisiana thereafter denied Arkla's application for a writ to review the Court of Appeal's decision. Arkla then filed a petition in this Court for a writ of certiorari to review the decision of the Louisiana Court of Appeal refusing to refer the interpretation of the favored nations clause to the Commission. *Arkansas Louisiana Gas Co.* v. *Hall*, No. 78-986. In response to the Court's invitation, the Commission and the United States filed a brief expressing the view that the Court of Appeal's decision was correct and that the petition should be denied. This Court denied the petition on October 1, 1979 (444 U.S. 878), and denied rehearing on July 2, 1980.

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[4] A "small producer" is defined in the Commission's regulations as an independent natural gas producer whose total sales in certain categories do not exceed 10 million Mcf per year. 18 C.F.R. 157.40.

2. After denying Arkla's petition for review, the Supreme Court of Louisiana granted respondents' petition for review and reversed that part of the Court of Appeal's decision limiting respondents' recovery to the period after 1972. The Supreme Court of Louisiana concluded that Arkla had prevented respondents from making appropriate rate filings with the Commission before 1972 by not informing respondents of its lease payments; that the Commission would have approved respondents' filings for a rate increase; and that respondents should therefore be allowed to recover damages for the entire period between September 1961 through December 31, 1975 (Pet. App. 83a-99a). In so ruling, the court did not believe that Arkla's "bad faith or fraud (or lack thereof) [was] relevant to a determination of whether it has prevented the fulfillment of a condition under which it [was] bound" (*id.* at 93a n.6).[5]

ARGUMENT

A. Introduction and Summary

Congress has provided in Section 4(a) of the Natural Gas Act, 15 U.S.C. 717c(a), that all rates and charges of natural gas companies in connection with

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[5] While Arkla's petition for certiorari in the instant case was pending, respondents filed with the Commission an application for a waiver of the Commission's filing requirements, on the apparent theory that if the Commission granted such a waiver the filed rate doctrine would not bar their recovery of damages for the period prior to 1972. The Commission denied the application on November 5, 1980 (Amici Supp. Mem. App. 1a-15a).

Arkla has also filed a separate petition for certiorari (No. 79-1896) to review whether, in calculating the damages awarded to respondents for breach of contract, the Louisiana courts permitted respondents to recover rates for sales of natural gas in excess of applicable rate ceilings established by the Commission. That petition is still pending.

the sale and transportation of natural gas subject to the Commission's jurisdiction "shall be just and reasonable"; any rate or charge "that is not just and reasonable is declared to be unlawful." A natural gas company is not required to seek the Commission's approval before putting its rates into effect. However, the company must file with the Commission a schedule showing all rates and charges subject to Commission jurisdiction, and it may not change its filed rates and charges without advance notice to the Commission and the public. 15 U.S.C. 717c(c), (d).[6] If the Commission, after a hearing had upon a complaint or on its own initiative, determines that existing rates or charges are unreasonable, then it may establish reasonable rates "to be *thereafter* observed and in force * * *." 15 U.S.C. 717d(a) (emphasis added). The primary purpose of this statutory scheme—and of the "substantially identical" provisions of the Federal Power Act (16 U.S.C. 824d, 824e) *Permian Basin Area Rate Cases*, 390 U.S. 747, 821 (1968); *FPC* v. *Sierra Pacific Power Co.*, 350 U.S. 348, 353 (1956)—is to protect consumers from excessive rates and charges. See *Municipal Light Boards* v. *FPC*, 450 F.2d 1341, 1348 (D.C. Cir. 1971), cert. denied, 405 U.S. 989 (1972); see also *FPC* v. *Sierra Pacific Power Co., supra,* 350 U.S. at 355.

It is thus settled under the Natural Gas Act that only those rates duly filed with the Commission are the lawful, collectible rates and only the Commission has the authority to determine the reasonableness of such rates. In accordance with these principles, a

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[6] The Commission may suspend the new rates for up to five months, after which they may be collected, subject—in the case of increased rates—to refund (with interest) of that portion of the increased rates which the Commission finds is not justified. 15 U.S.C. 717c(e).

regulated company may not set rates to recoup past losses, nor may the Commission award damages or reparations to injured parties for unreasonable past rates. See *FPC* v. *Sunray DX Oil Co.*, 391 U.S. 9, 24 (1968); *FPC* v. *Tennessee Gas Co.*, 371 U.S. 145, 152-153 (1962); *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254 (1951); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618 (1944). See also, *e.g.*, *Public Service Co. of N. H.* v. *FERC*, 600 F.2d 944, 957-958 (D.C. Cir.), cert. denied, 444 U.S. 990 (1979); *Maine Public Service Co.* v. *FPC*, 579 F.2d 659, 663-664 (1st Cir. 1978).

The Supreme Court of Louisiana nonetheless held in this case that respondents were entitled to collect more than the amount provided for in the filed rate. The court below acknowledged that petitioner "was only bound to pay [respondents] a higher price if [respondents] filed new rate schedules with the Commission" (Pet. App. 92a). The court noted, however, that respondents "were effectively precluded from making the requisite filings because they were not, at any time, informed by [petitioner] that it was, in fact, paying a higher price to another party seller" (*ibid.*). The court concluded that if respondents had in fact followed the proper filing procedures, "it was more probable than not that the Commission would have approved a contractually-authorized price increase" (*id.* at 94a).

As we explain more fully below, this ruling is contrary to the "filed rate" doctrine as it applies to the Natural Gas Act, is inconsistent with the closely related legislative rule that the Commission has no power to grant reparations under the Act, and is at odds with the decisions of this Court in this area. Accordingly, we submit that the judgment of the Supreme Court of Louisiana should not be allowed to stand.

B. The "Filed Rate" Doctrine Bars Courts From Passing Upon The Reasonableness Of Previously Filed Rates

The "filed rate" doctrine rests upon a complex of considerations that reflects the congressional conclusion in a particular regulatory scheme that rates should be embodied in tariffs on file with the regulatory agency and that the "crucial question of [the] reasonableness [of rates should] not be decided by the courts." *T.I.M.E. Inc.* v. *United States*, 359 U.S. 464, 473 (1959). In its initial formulation, the rule, which became a central element of the Interstate Commerce Act of 1887, sought to remedy the open resort to discriminatory practices by railroads during the middle of the Nineteenth Century. As one leading commentator on that Act observed:

> These railroad discriminations assumed many forms, but none was more glaringly unjust or more obviously destructive of sound economic development than the grant of personal preferences to favored shippers. The published classifications and tariffs were also so adjusted in numerous instances as to inure to the special advantage of particular localities and types of traffic and to the distinct prejudice of other places and commodities. Sharp resentment at the manifest injustice and baleful consequences of the rebating evil and at the subversive industrial tendencies inherent in rate maladjustments was the most potent factor leading to federal legislation.

1 I. Sharfman, *The Interstate Commerce Commission* 17-18 (1931) (footnote omitted).

Following the enactment of the Interstate Commerce Act, this Court explained that the primary purpose of the Act, in seeking to prevent unjust and unreasonable rates,

> was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs * * *. For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about.

New York N. H. & H. R. R. v. *ICC*, 200 U.S. 361, 391-392 (1906). To achieve this end, "[t]he tariff, so long as it was [in] force was * * *to be treated as though it had been a statute, binding upon Railroad and shipper alike." *Pennsylvania R.R.* v. *International Coal Co.*, 230 U.S. 184, 197 (1913). In a subsequent case, the Court emphasized that "[u]nder * * * the Interstate Commerce Act the carrier cannot deviate from the rate specified in the tariff for any service in connection with the transportation of property." *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U.S. 516, 520 (1939) (footnotes omitted). In keeping with this rule, the Court held that without an official change in rates, the parties cannot, even by contract, lawfully alter the published rate. *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97 (1915); *Texas & Pacific Ry.* v. *Mugg*, 202 U.S. 242 (1906). In short, the filed rate doctrine establishes a system whereby "rates * * * should have a uniform application to all and * * * should not be departed from so long as the established schedule remain[s] unaltered in the manner provided by law."

Texas & Pacific Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907).

The doctrine serves both to give the public notice of proper rates (*Louisville & Nashville R.R.* v. *Maxwell, supra*) and to insure adherence to the regulatory scheme. *Dayton Iron Co.* v. *Cincinnati, N. O. & T. P. Ry.*, 239 U.S. 446, 451 (1915); *Mitchell Coal Co.* v. *Pennsylvania, R.R.*, 230 U.S. 247, 259 (1913). The considerations underlying the rule are "preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *City of Cleveland* v. *FPC*, 525 F.2d 845, 854 (D.C. Cir. 1976). See *City of Piqua, Ohio* v. *FERC*, 610 F.2d 950, 955 (D.C. Cir. 1979).

It is clear that the salutory goals of equality and certainty of rates would be frustrated by recognizing an authority in the courts, separately and independently from the regulatory agency, to pass upon the reasonableness of rates. As this Court explained in the landmark *Abilene* case (204 U.S. at 441), "the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

Under the filed rate doctrine, therefore, "the right to a reasonable rate is the right to the rate which the Commission files or fixes, and * * *, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable

one." *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* 341 U.S. at 251-252. The decision in *Montana-Dakota* establishes that the courts are "bound to defer to the Commission's primary jurisdiction in the matter of rates, and utilities are prohibited from demanding and collecting rates other than those filed with the Commission." *Maine Public Service Co.* v. *FPC, supra,* 579 F.2d at 666.

C. The Statutory Prohibition Of Retroactive Ratemaking By The Commission Also Bars The Courts From Awarding Reparations for Unreasonable Past Rates

Under the Natural Gas Act the Commission is barred from retroactively substituting a just and reasonable rate for a past rate that has been found unreasonable. *FPC* v. *Tennessee Gas Co., supra,* 371 U.S. 152-153; *FPC* v. *Sierra Pacific Power Co., supra,* 350 U.S. at 353; *FPC* v. *Hope Natural Gas Co., supra,* 320 U.S. at 618. The statutory scheme leaves no room for regulated companies to achieve indirectly, through judicial proceedings, what they may not obtain directly from the Commission. This conclusion follows from this Court's decision in *T.I.M.E. Inc.* v. *United States, supra.*

T.I.M.E. Inc. involved the question whether under the Motor Carrier Act of 1935 (Part II of the Interstate Commerce Act) a shipper of goods by a certificated carrier had a cause of action for the recovery of past rates paid by it on the ground that such rates were unreasonable, even though the rates had been duly filed with the Interstate Commerce Commission. The Court rejected the argument advanced by the dissenters (359 U.S. at 482 (Black J., dissenting)) that only if there was a reparations provision in the statute could it fairly be concluded that the existence of primary jurisdiction in the Commission precluded a common-law right of shippers to sue

for damages caused by unreasonable rates.[7] Instead, the majority concluded that

> [i]t would be anomalous to hold that Congress intended that the sole effect of the omission of reparations provisions in the Motor Carrier Act would be to require the shipper in effect to bring two lawsuits instead of one, with the parties required to file their complaint and answer in a court of competent jurisdiction and then immediately proceed to the I. C. C. to litigate what would ordinarily be the sole controverted issue in the suit. No convincing reason has been suggested to us why Congress would have wished to omit a direct reparations procedure, as it has concededly here done, and yet leave open to the shipper the circuitous route contended for.

359 U.S. at 474.[8]

The decision of the Court in *T.I.M.E. Inc.* is of particular relevance here because the Court in that case specifically reaffirmed the rule, previously adopted in *Montana-Dakota,* that the filed rate doctrine does not depend for its existence upon a statu-

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[7] In focusing upon the presence or absence of a reparations provision as dispositive, the dissent noted that in the *Abilene* case the Court interpreted the inclusion of a reparation provision in Part I of the Interstate Commerce Act (relating to rail carriers) as implying that Congress had intended to supplant "the pre-existing common-law right of shippers to sue for damages caused by unreasonable rates * * *." *T.I.M.E. Inc.* v. *United States, supra,* 359 U.S. at 482 (Black. J., dissenting).

[8] In 1965, following the decision in *T.I.M.E. Inc.,* Congress amended the Motor Carrier Act to allow shippers to sue for reparations. Pub. L. No. 89-170, Section 6, 79 Stat. 651. See *ICC* v. *B & T Transportation Co.,* 613 F.2d 1182, 1185-1186 (1st Cir. 1980).

tory reparations provision. In *Montana-Dakota* the court had concluded that "[t]he fact that Congress withheld from the Commission the power to grant reparations does not require courts to entertain proceedings they cannot themselves decide in order indirectly to obtain Commission action which Congress did not allow to be taken directly." 341 U.S. at 254. (footnote omitted).

Moreover, in attempting to distinguish the Motor Carrier Act of 1935 from the Federal Power Act, the statute at issue in *Montana-Dakota*, the dissenters in *T.I.M.E. Inc.* agreed that the policies underlying the Federal Power Act would not be served by allowing refunds for past rates found to have been excessive. 359 U.S. at 491. The dissenters noted that the core purpose of the Power Act was "to benefit consumers by holding down wholesale prices." 359 U.S. at 491. They observed that in *Montana-Dakota* the Court had indicated that "the consumers would not be helped by *ex post facto* determinations of unreasonableness resulting in a refund to wholesalers." 359 U.S. at 491.[9]

D. Application Of The Foregoing Principles To This Case Clearly Warrants Reversal Of The Determination Of The Supreme Court Of Louisiana

We have shown that, in light of the regulatory scheme established by the Natural Gas Act and the decisions of this Court in *Montana-Dakota* and *T.I.M.E. Inc.*, no extra-statutory remedy exists pursuant to which a court may in an independent action

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[9] In the dissenters' view this was wholly different from the Motor Carrier Act involved in *T.I.M.E. Inc.*, where refunds would go to shippers who, "in many instances, [are] the ultimate parties on whom the burden falls." 359 U.S. at 492.

reassess the reasonableness of rates duly filed with the Commission. In addition, the absence of a reparations provision in the Natural Gas Act provides no basis for concluding that the courts may order reparations in compensation even for unjust or unreasonable rates. These principles demonstrate that the decision below is erroneous.

To be sure, respondents have brought this action under a breach of contract theory, and not on the ground that they may challenge the previously filed rates as having been unreasonable. But in awarding damages to respondents for Arkla's alleged breach of contract, the court below was forced to speculate as to whether or not the Commission "would have approved a contractually-authorized price increase if the proper filing procedures had been followed" (Pet. App. 94a).[10] Under the filed rate doctrine, however, it was not proper for the court to assume that the Commission would have accepted the higher rates as reasonable. The determination of reasonableness was for the Commission alone to make.[11] As the Commission observed in denying respondents' application to waive the filing requirements of the Natural Gas Act (Amici Sup. Mem. App. 9a):

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[10] The court noted that "[n]o evidence was adduced by [Arkla] to establish that Commission approval would have been unlikely" (Pet. App. 94a).

[11] The Louisiana Court of Appeal correctly rejected respondents' contention that the filed rate doctrine is inapplicable because the instant action is for damages and not for a retroactive price increase. "The action for damages to be successful necessarily assumes a price increase would have been granted by the FPC. That such approval would have been granted by the commission is highly speculative and cannot serve as a basis for an award of damages" (78-986 Pet. App. 14a).

> [W]e believe the damage award constitutes a rate increase without the Commission's having determined that the new rate is just and reasonable, to the detriment of the Federal statutory scheme. Simply put, if the mere fact that a state court may have concurrent jurisdiction over a contract is sufficient to take all disputes that might arise under the contract, and all possible remedies that might be found for breach of the contract, outside the scope of the Natural Gas Act, then the certainty as to rates that results from the filing requirements in Section 4(c) and 4(d) of the Natural Gas Act is lost, and the Commission's exclusive jurisdiction to determine just and reasonable rates for interstate gas is rendered meaningless.

Moreover, the Commission is not now in a position to make a post hoc determination regarding the reasonableness of the rates that respondents would have charged Arkla in the period between 1961 and 1972.[12] The Commission would, in any event, be precluded by Section 5(a) of the Act (15 U.S.C. 717d(a)) from approving retroactive ratemaking. Under this Court's decisions in *Montana-Dakota* and *T.I.M.E. Inc.*, the Louisiana courts are similarly precluded.

This result is consistent with the statute's central purpose of benefitting consumers by holding down wholesale prices. The actual consumers of the gas, Arkla's past customers, have already paid for the gas, and any surcharges that Arkla may be permitted to levy in order to recover for the damages awarded to

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[12] In its decision on respondents' waiver application, the Commission refused to speculate "as to how our predecessors would have acted nineteen years ago" (Amici Supp. Mem. App. 15a).

respondents would fall on a different group of customers. Cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co., supra,* 341 U.S. at 254; *T.I.M.E. Inc.* v. *United States, supra,* 359 U.S. at 491 (Black, J., dissenting).

Finally, we note that the Louisiana Court of Appeal found the evidence insufficient to support an allegation of fraudulent concealment (78-986 Pet. App. 14a) and the Louisiana Supreme Court concluded that the issue of bad faith or fraud was irrelevant here (Pet. App. 93a n.6). This case thus does not present the question whether the filed rate doctrine and the statutory prohibition of retroactive ratemaking would bar a judicial award of damages in a case involving active fraud.

CONCLUSION

The judgment of the Supreme Court of Louisiana should be reversed.

Respectfully submitted.

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MARCH 1981

☆ U. S. GOVERNMENT PRINTING OFFICE; 1981 339180 279